

No. 76-122

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANTHONY R. FIELD, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the district court (Pet. App. 1-2) is not reported. The opinion of the court of appeals (Pet. App. 3-15) is reported at 532 F. 2d 404.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3) was entered on May 13, 1976, and a petition for rehearing was denied on June 28, 1976 (Pet. 2). The petition for a writ of certiorari was filed on July 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a grand jury witness who has been granted immunity from prosecution can invoke the Fifth

(1)

Amendment and refuse to testify on the ground that the act of giving testimony would subject him to prosecution in a foreign jurisdiction.

2. Whether the grand jury subpoena was properly served upon petitioner.

STATEMENT

Petitioner, a Canadian citizen, is the managing director of the Castle Bank and Trust Company (Cayman), Ltd., in Georgetown, Grand Cayman Island, British West Indies. While in Miami International Airport on January 12, 1976, petitioner was served with a subpoena directing him to appear before a grand jury in the Southern District of Florida that was investigating possible criminal violations of the tax laws. The investigation focused in part upon the use of foreign banks to evade United States taxes (Pet. App. 4).

On January 20, 1976, petitioner appeared before the grand jury and was asked several questions with respect to his activities on behalf of the Castle Bank and its clients. Petitioner invoked his Fifth Amendment privilege and refused to answer these questions. He also claimed that his testimony would violate the bank secrecy laws of the Cayman Islands. Petitioner was thereafter given immunity and ordered to testify, but he still refused to answer the questions (Pet. App. 4).

At a hearing held by the district court on petitioner's motion to quash the subpoena, the government introduced evidence that the Castle Bank had engaged in activities in the United States. Petitioner submitted an affidavit by an expert on Cayman law that he could be subject to criminal punishment in the Cayman Islands for the act of answering questions about the bank's activities before the grand jury (Pet. App. 5). After

ordering petitioner to testify and petitioner's refusal to do so, the district court held him in civil contempt and ordered him to be committed until he testified or the term of the grand jury expired (Pet. App. 11).

The court of appeals affirmed (Pet. App. 3-15). It acknowledged that petitioner would be exposed to possible criminal prosecution in the Cayman Islands by virtue of giving testimony before the grand jury, but it held that this fact nevertheless did not entitle him to resist the order to testify by invocation of the Fifth Amendment privilege against compulsory self-incrimination. Noting that there was no suggestion that the content of petitioner's testimony would be self-incriminatory under either United States or Cayman Islands law,

¹The district court stayed petitioner's confinement pending appeal and released him pursuant to a continuing \$25,000 appearance bond. The terms of the bond require petitioner to appear before the district court as may be ordered. After the court of appeals' affirmance and the filing of the petition for a writ of certiorari, petitioner sought from this Court a stay of "all proceedings in the United States District Court for the Southern District of Florida" pending certiorari (No. A-106). However, there are currently no "proceedings" in the district court that threaten to place petitioner in contempt and confinement. The term of the grand jury that issued the subpoena upheld by the courts below has expired. On August 16, 1976, Mr. Justice Powell denied petitioner's application for a stay.

Although there is now a second subpoena of a successor grand jury outstanding against petitioner, that subpoena has not been served, and petitioner is not currently required to appear before the successor grand jury. We are advised that petitioner has returned to the Cayman Islands with the government's permission. He has stated that he will appear before the district court in response to a "lawful" order—as, indeed, he is required to do by the terms of his bond in the district court. The case is therefore not moot because there is a live and continuing controversy between the parties. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752-757.

the court found the danger against which the constitutional privilege protects to be entirely absent in this case (Pet. App. 6-8). The court stated that "[t]he Fifth Amendment simply is not pertinent to the situation where a foreign state makes the act of testifying a criminal offense" (*id.* at 8).

The court then considered and rejected petitioner's contentions that enforcement of the subpoena should be refused as a matter of international comity (*id.* at 8-13) and that service of the subpoena violated due process because it had been issued without prior opportunity for a hearing (*id.* at 13-14).

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the bank secrecy law of the Cayman Islands confers upon him a privilege to refuse to testify before the grand jury concerning his activities on behalf of the Castle Bank and Trust Company and its clients. He argues that the Cayman statute is analogous to the common law husband-wife and attorney-client privileges.

We note at the outset that this unique claim of privilege can hardly be said to accord with "the principles of the common law as they may be interpreted * * * in the light of reason and experience." Fed. R. Evid. 501. No principle of banker-deposit confidentiality has evolved in Anglo-American jurisprudence; rather, the law has deemed interests of privacy in such relationships² to be generally subordinate to societal needs for enforcement of laws and just settlement of disputes. Since there plainly exists no

²The extent of such interests under present law is, at the least, quite limited in the face of grand jury inquiry. See *United States v. Miller*, No. 74-1179, decided April 21, 1976.

banker-depositor privilege within the United States nor any judicially acknowledged need to move toward general recognition of such a testimonial privilege in American courts, it seems unlikely that a special privilege for bankers and depositors in a small number of foreign countries can be constructed consistently with Rule 501.

Moreover, the law of the Cayman Islands does not erect a bank-client privilege that would bar all disclosure of information of the kind sought to be elicited from petitioner. The Cayman statute upon which petitioner relies permits disclosure of banking information in connection with "the performance of * * * duties or the exercise of * * * functions under this Law or when lawfully required * * * by any court of competent jurisdiction within the Islands or under the provisions of any Law of the Islands * * *" (Pet. App. 30). Thus, Cayman law enforcement officials would be able to obtain the very information that petitioner claims is privileged *vis-a-vis* a United States grand jury. Under such circumstances, the federal courts should not create a special privilege tailored to petitioner's situation.

2. Petitioner further argues (Pet. 11-13) that the enforcement of the grand jury subpoena would violate his Fifth Amendment privilege against compulsory self-incrimination. But as the court of appeals correctly observed (Pet. App. 7), "[t]he consistent interpretation of the Amendment has been to insure that a person would not be required to give testimony that tended to show that the person had committed a crime." Here, there is no danger that petitioner's testimony would compel "incriminating evidence from [his] own mouth" (*Couch v. United States*, 409 U.S. 322, 327), because the prior grant of immunity removed the risk of incrimination. *Kastigar v. United States*, 406 U.S. 441. As the Court stated last Term in *Fisher v. United*

States, No. 74-18, decided April 21, 1976, slip op. 9: "We adhere to the view that the Fifth Amendment protects against 'compelled testimony not [the disclosure of] private information.' *United States v. Nobles*, 422 U.S. 225, 233 n. 7 (1975)."

Petitioner contends that the Fifth Amendment bars his testimony because the act of testifying would subject him to criminal sanctions under the Cayman bank secrecy law. But the Fifth Amendment does not protect against the possibility of prosecution in a foreign state for the act of testifying. Rather, the privilege protects a person "against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Lefkowitz v. Turley*, 414 U.S. 70, 78.

There is here no showing that the contents of petitioner's testimony would provide evidence of any violations of Cayman criminal law. Indeed, petitioner conceded in oral argument in the court of appeals that "he did not anticipate that any answers [he] might give to the grand jury will provide information concerning any violations of Cayman Law" (Pet. App. 6 n. 4). This case, therefore, is controlled by *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472, in which the witness claimed that he was in danger of "being compelled to disclose information that might incriminate him under foreign law" (406 U.S. at 480). There, the Court found it unnecessary to resolve the question whether the Fifth Amendment protects against compulsory testimony that would expose a person to foreign prosecution, because the circumstances involved no "real danger" that the witness would be "compelled to disclose information that might incriminate him under foreign law" (406 U.S. at 480). It follows, *a fortiori*, that where, as here, as the court of appeals noted, petitioner did not even

"argue that the content of his answers before the grand jury [would] subject him to prosecution in the Cayman Islands" (Pet. App. 6), the constitutional question not reached in *Zicarelli* is not presented.³

3. Petitioner further contends (Pet. 13-16) that the decision below conflicts with *United States v. First National City Bank*, 396 F. 2d 897 (C.A. 2); *Application of Chase Manhattan Bank*, 297 F. 2d 611 (C.A. 2); and *First National City Bank of N.Y. v. Internal Revenue Service*, 271 F. 2d 616 (C.A. 2), certiorari denied, 361 U.S. 948. Those cases involved the entirely distinguishable situation of a subpoena to compel the production of records located in a foreign country, when the subpoenaed party claimed that compliance would violate the laws of the foreign country. Indeed, in the first of the cited cases, the court held that the possibility of civil liability under foreign law did not

³In contrast to his position in the courts below, petitioner now argues (Pet. 12) that the contents of his testimony may be used against him in a criminal prosecution in the Cayman Islands. But petitioner has not shown that there is any danger that the provisions of Rule 6(e), Fed. R. Crim. P., providing for secrecy of grand jury proceedings, would be violated. As this Court stated in *Zicarelli*, *supra*, 406 U.S. at 478, "[i]t is well established that the privilege protects against real dangers, not remote and speculative possibilities." The courts of appeals have uniformly held that the secrecy of the grand jury is a sufficient safeguard against the danger of foreign prosecution. See *In re Tierney*, 465 F. 2d 806, 811 (C.A. 5); *In re Long Visitor*, 523 F. 2d 443, 447 (C.A. 8); *In re Weir*, 495 F. 2d 879, 881 (C.A. 9), certiorari denied, 419 U.S. 1038; *In re Parker*, 411 F. 2d 1067, 1069-1070 (C.A. 10), vacated as moot, 397 U.S. 96.

justify disobeying a subpoena.⁴ Here, however, the subpoena only requires petitioner to testify before a grand jury in the United States and does not compel him to commit any act within the Cayman Islands.

4. Finally, petitioner argues (Pet. 16-18) that the service of the subpoena was invalid because it was directed to a witness in a foreign country⁵ and therefore had to be issued and served in accordance with 28 U.S.C. 1783, which permits service of process upon witnesses in foreign countries only if they are United States citizens or residents. See Rule 17(e), Fed. R. Crim. P. But petitioner was in the United States on the date that the subpoena was served upon him. Accordingly, the subpoena was not "directed to a witness in a foreign country" within the meaning of Rule 17(e)(2). As the court of appeals correctly recognized (Pet. App. 14), any person found within the jurisdiction of the court may be subpoenaed, whatever his citizenship or country of residence. *United*

⁴In *First National City Bank of N.Y. v. Internal Revenue Service*, *supra*, the court enforced the subpoena because no showing was made that foreign law would prevent production. In *Application of Chase Manhattan Bank*, *supra*, the court modified the subpoena to the extent that its enforcement would require acts within a foreign country that were equivalent to a misdemeanor.

⁵For this proposition, petitioner relies upon the language of the subpoena, which was directed to

Tony Field, A/K A Anthony Field, Manager Castle Bank and Trust, Ltd. Georgetown, Cayman Islands

But the reference to "Georgetown, Cayman Islands" is simply part of the descriptive language identifying petitioner. It does not establish that the subpoena was directed to a witness in a foreign country.

States v. Germann, 370 F. 2d 1019, 1022-1023 (C.A. 2).⁶

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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⁶Petitioner also argues (Pet. 16-17) that under *Fuentes v. Shevin*, 407 U.S. 67, he was entitled to a hearing prior to the issuance of the subpoena. In *Fuentes*, the Court held unconstitutional a procedure whereby court clerks issued writs of replevin upon *ex parte* application. But as the court of appeals noted (Pet. App. 14), the rights of a witness summoned to appear before a grand jury are adequately protected by the opportunity to contest the subpoena. Indeed, a prior hearing would not have satisfied petitioner's complaint, for requiring him to appear for such a prior hearing on whether a subpoena should issue would involve the same restraints on liberty that are involved in the requirement to appear before a grand jury. At all events, the duty to appear before a grand jury and to testify has long been recognized because of the public's overriding interest in full disclosure. *Blair v. United States*, 250 U.S. 273, 281; *United States v. Bryan*, 339 U.S. 323, 331; *United States v. Calandra*, 414 U.S. 338, 342-345.